United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7097-7129

ORIGINAL

To be argued by Frederick Fish

United States Court of Appeals

For the Second Circuit.

B
P/S

RAYMOND INTERNATIONAL, INC.,
Plaintiff-Appellee,

against

PETER KIEWIT-SLATTERY (JOINT VENTURE) sued herein as PETER KIEWIT SONS' COMPANY and SLATTERY ASSOCIATES, Inc., d/b/a PETER KIEWIT SONS' COMPANY-SLATTERY ASSOCIATES, Inc.,
Defendant-Appellant.

PETER KIEWIT-SLATTERY (JOINT VENTURE) sued herein as PETER KIEWIT SONS' COMPANY and SLATTERY ASSOCIATES, Inc., d/b/a PETER KIEWIT SONS' COMPANY-SLATTERY ASSOCIATES, Inc.,
Third-Party Plaintiff-Appellee,

against

BAYSHORE CONCRETE PRODUCTS COMPANY,
Third-Party Defendant-Appellant.

BRIEF FOR RAYMOND INTERNATIONAL, INC., PLAINTIFF-APPELLEE.

SYMMERS, FISH & WARNER
Attorneys for Raymond International, Inc.
Plaintiff-Appellee
345 Park Avenue
New York, N. Y. 10022
(212) 751-6490

THE REPORTER COMPANY, INC., New York, N. Y. 10007—212 732-6976—1976

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BRIEF FOR RAYMOND INTERNATIONAL, INC., PLAINTIFF-APPELLEE.

Issue Presented for Review.

Is the manufacturer and seller of a 130-ton concrete beam designed as a component part of a highway bridge liable to the owner and operator of a derrick barge for damage to that craft when a lifting device incorporated into the

concrete beam at the time of manufacture broke while the beam was being hoisted by that craft for placement in the bridge structure?

Statement of the Case.

These are appeals by defendant and third-party plaintiff-appellant and appellee Peter Kiewit-Slattery (Joint Venture) (hereinafter "Kiewit") and third-party defendant and defendant-appellant Bayshore Concrete Products Company (hereinafter "Bayshore"), from a judgment of the District Court for the Southern District of New York awarding Raymond International, Inc. (hereinafter "Raymond"), the sum of $30,200 against Kiewit and Bayshore jointly and severally by reason of damage to Raymond's derrick barge CENTURY caused on or about 28 April 1970 when the CENTURY was engaged under contract with Kiewit in lifting a huge concrete T beam from another barge alongside to place it 40 or 50 feet overhead in the structure of a bridge being erected by Kiewit and when the lifting loops, incorporated in the beam at the time of its manufacture and sale by Bayshore to Kiewit, parted in the course of normal lifting procedures. On or about 25 June 1970 Raymond commenced action within the Admiralty jurisdiction of the Court against Kiewit on the grounds of negligence and breach of contractual warranties. Kiewit then filed third-party complaint (as amended) against Bayshore seeking indemnity together with recovery of extra expenses sustained by Kiewit as a result of the casualty. Thereafter Raymond filed amended complaint seeking also direct recovery from Bayshore on the grounds of negligence and under the doctrine of strict products liability of a manufacturer.

After completion of pre-trial discovery procedures and entry of a pre-trial order the case came on to be heard before the Court, Honorable Constance Baker Motley, U. S. D.

J., on June 5, 6, 7 and 10, 1974. The District Court granted not only a joint and several judgment in favor of Raymond against Kiewit and Bayshore but also indemnity in favor of Kiewit against Bayshore plus an additional award of $44,386.22 against Bayshore in favor of Kiewit for the expenses claimed by Kiewit.

Both Kiewit and Bayshore have appealed from said judgment. In its brief Kiewit describes its appeal as "protective" in nature. Neither Kiewit nor Bayshore now contests Kiewit's liability to Raymond. The judgment of Raymond against Kiewit accordingly should be affirmed, leaving for consideration by this Court, insofar as Raymond is concerned, only the issue of Bayshore's liability to Raymond.

Statement of Facts.

The opinion by Judge Motley (R. 539-557)* is an excellent, detailed and accurate narrative of the events and circumstances in question, fully supported by citations of exhibits and transcript of testimony. No contention has been made on appeal by any party that any statement or finding of fact therein is erroneous. It would be superfluous to repeat that narrative here.

The statement of facts in Bayshore's brief contains certain errors and omissions which should be amended and supplemented as follows.

The beam (or girder) in question, of precast and prestressed concrete, was T shaped, 130 feet long, two feet thick, eight feet high, eight feet wide on top and weighed 130 tons (Bayshore's answer to Raymond interrogatory 11; contract, Exh. 2, R. 499).

*Record references are to the pages of joint appendix.

The lifting device is most accurately described, and most frequently referred to by the witnesses, as a lifting loop, although referred to on occasion as a lifting hook, or strap, or, by one witness, as a lifting pad. A photograph of lifting loops is reproduced in the record at page 537. The loops were described in Bayshore's answer to Raymond's interrogatory 13:

> Composed of four lifting straps, two at each end, U-shaped with over all end length of 29 and 33 inches. Each loop consisted of two strands of 7/16 and 1/2 inch wire and one 1/2 inch wire covered with a protective sheathing approximately 22 inches long and was embedded in concrete when the section was cast.

They were described by metallurgist Silkiss in his report (Exh. XXIV, R. 516 at 517):

> As received, the loops were U-shaped with an overall end-to-end length of 29 and 33 inches. Each loop was covered with a protective sheath approximately 22 inches long * * *.
>
> Individually, the loops consisted of three strands, two of which were nominally of 7/16-in. diameter-7 wire construction and one 1/2-in. diameter-7 wire construction. The strands were merely laid side by side to each other and did not comprise a standard rope construction.

The T beams were manufactured in accordance with the terms of a prior contract between Triborough Bridge & Tunnel Authority and Kiewit (not in evidence) and certain drawings and specifications (also not in evidence) (Exh. 2, R. 499).

In reply to a question of the Court (R. 138), counsel for Bayshore stipulated (R. 138, 139):

> It [the lifting loops] was installed into the girders for the absolute necessity of Bayshore using them to lift the girders after manufacture and put them on the scale, and I would admit that they were left there for use as far as the convenience of Kiewit is concerned.

The beams were delivered F. O. B. to Kiewit scows at Bayshore's plant, Cape Charles, Virginia (Exh. 2, R. 500). The beams were loaded on the scows and secured by Bayshore, subject to final inspection and approval of the United States Salvage Association (R. 399).

The probable cause of the failure of the lifting loops was their improper design, as found by Judge Motley (R. 548, 549), a finding supported by the testimony and report of metallurgist Silkiss (R. 384-386; Exh. M, R. 515). See also, opinion of Freelund (R. 214-227).

Argument.

As indicated in the statement of the case there is no issue remaining raised by either Bayshore or Kiewit as to Kiewit's liability to Raymond. Raymond is not concerned with Points III and IV of Bayshore's brief which relate to issues between Bayshore and Kiewit only. Argument herein will be directed solely to Bayshore's Points I and II.

It is Raymond's submission that the Court below was clearly correct in ruling that Bayshore is liable to Raymond under the rules relating to breach of warranty and strict manufacturer's products liability.

POINT I.

The failure of the lifting loops provided by Bayshore falls within the doctrine of strict liability.

The doctrine has been restated by the Court of Appeals, New York, in *Codling v. Paglia*, 32 N. Y. 2d 330 at 342 (1973):

> We accordingly hold that, under a doctrine of strict products liability, the manufacturer of a defective product is liable to any person injured or damaged if the defect was a substantial factor in bringing about his injury or damages; provided: (1) that at the time of the occurrence the product is being used (whether by the person injured or damaged or by a third person) for the purpose and in the manner normally intended, (2) that if the person injured or damaged is himself the user of the product he would not by the exercise of reasonable care have both discovered the defect and perceived its danger, and (3) that by the exercise of reasonable care the person injured or damaged would not otherwise have averted his injury or damages.

See also, Restatement of Torts, 2d, §402A; *Goldberg v. Kollsman Instrument Corp.*, 12 N. Y. 2d 432 (1963); *Delaney v. Towmotor Corp.*, 339 F. 2d 4 (2d Cir. 1964); *Basko v. Sterling Drug, Inc.*, 416 F. 2d 417 (2d Cir. 1969); Prosser, *The Law Of Torts* (4th ed. 1971), §§ 98-101; Frumer & Friedman, *Products Liability* (1973), Volume 2, Chapter 3, §§ 16 and 16A.

The doctrine is not limited to mass produced articles. See the exhaustive and extended category of articles involved in other cases set forth in Frumer & Friedman, *supra*, Volume 4. Distribution of economic loss is only one of the goals. Perhaps the most important object is

protection from serious danger to one or several persons, *Devlin v. Smith*, 89 N. Y. 470 (1882); *Goldberg, supra*, 12 N. Y. 2d at page 436; *Codling, supra*, 32 N. Y. 2d at page 340. In this case it was almost a miracle that there was not loss of life and severe personal injury as well as greater economic loss.

At the present time there is no question but that the lifting loop was defective, that it was being used for the purpose and in the manner normally intended, that Raymond could not by the exercise of reasonable care have discovered the defect (the ends of the loops were embedded in concrete, the remainder covered by a protective sheath) and that Raymond exercised due care.

POINT II.

There was breach by Bayshore of its implied warranty of fitness for use.

Bayshore now contends that the lifting loops were excluded from its contract of sale, that there was no "sale" of the loops and that no defect has been proved. None of these contentions has merit.

The contract of sale, Exhibit 2, provides in Section 2 (R. 499 at 503):

> It is agreed that the Seller will furnish all material embedded into the prestressed items. Not included are such items as bearing pads, bearing assemblies and teflon materials * * *

Bayshore's counsel have attempted to equate "lifting loop" with "lifting pad" and "lifting pad" with "bearing pad."

A pad is not a lifting device. It is rather, in ordinary usage, "a thin flat mat or cushion," Webster's *New Collegiate Dictionary* (1973). Other meanings (such as lily pad) are irrelevant. The contract refers to a "bearing pad" (normal usage), not a "lifting pad." It further relates to source of material furnished, not exclusion from the object sold.

The lifting loops were embedded in the beam and formed an integral part of the article sold. The distinction attempted is comparable to the "amazing" metaphysical distinction between container and contents (i. e., cracked bottle vs. contaminated beverage therein). See, Prosser, *The Assault Upon The Citadel (Strict Liability To The Consumer)*, 69 Yale L. J. 1099 at 1138 (1968), and Prosser, *The Law Of Torts* (4th ed. 1971), Ch. 17, §99, Unsafe Products, at page 659, footnote 67.

The use of the word "sale" is not conclusive. There need not be a technical sale. It is sufficient if the manufacturer introduces the article into the stream of commerce and invites its use. *Randy Knitwear v. American Cyanamid Co.*, 11 N. Y. 2d 5 (1962); *Delaney v. Towmotor Corp.*, 339 F. 2d 4 (2d Cir. 1964), *supra.* As to this, Bayshore counsel's concession is conclusive (R. 138):

> It [the lifting loops] was installed into the girders for the absolute necessity of Bayshore using them to lift the girders after manufacture and put them on the scale, and I would admit that they were left there for use as far as the convenience of Kiewit is concerned.

As to degree of proof required of existence of defect, the Court below has found on uncontroverted evidence (R. 548) that there was such causal defect in design and manufacture of the loops.

Conclusion.

The joint and several judgment in favor of Raymond International, Inc., against Peter Kiewit-Slattery (Joint Venture) and Bayshore Concrete Products Company entered herein should be affirmed.

Dated: New York, New York,
June 16, 1976.

Respectfully submitted,

SYMMERS, FISH & WARNER,
Attorneys for Raymond International, Inc.,
Plaintiff-Appellee,
345 Park Avenue,
New York, N. Y. 10022
(212) 751-6400.

The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

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Third Party Defendant-Appellant

} AFFIDAVIT OF SERVICE

STATE OF NEW YORK,

COUNTY OF NEW YORK, ss:

Raymond J. Braddick, agent for Symmers Fish & Warner being duly sworn,

deposes and says that he is over the age of 21 years and resides at
Levittown, New York

That on the 11th. day of June , 1976

he served the annexed Brief upon

Alexander Ash Schwartz & Cohen Esqs.
Of Counsel to Semel, McLaughlin & Boeckmann
Attorneys for Third Party Defendant-Appellant
801 Second Avenue
New York, New York

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in this action, by delivering to and leaving with said attorneys

three true copies to each thereof.

DEPONENT FURTHER SAYS, that he knew the persons so served as aforesaid to be the persons mentioned and described in the said action.

Deponent is not a party to the action.

Sworn to before me, this 11th.

day of June, 1976

Roland W. Johnson
ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1977

} Raymond J. Braddick

Services of three (3) copies of
the within is
hereby admitted this day
of , 197

Attorney for

Services of three (3) copies of
the within is
hereby admitted this 14th day
of June , 1977

Attorney for